

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION NO.1179 OF 1982

WITH

CIVIL REVISION APPLICATION NO.1180 OF 1982

THE HON'BLE MR. JUSTICE Y.B. BHATT:

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1. Whether Reporters of Local Papers may be allowed to see the judgement?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

Appearance:

Mr. H.B. Shah, advocate for the petitioners.

Mr. S.R. Shah, advocate for the respondent.

CORAM: Y.B. BHATT J.

Date of Decision: 09-01-1996

JUDGEMENT

1. The petitioners herein are the respective plaintiffs of HRP Suit No.4732/80 and HRP Suit No.4731/80, filed under section 28 of the Bombay Rent Act (hereinafter referred to as 'the said Act'). The respondent in the two revisions is the original defendant-landlord in the two suits.

2. The plaintiffs had filed the suit under section 28 of the said Act averring that the respondent-defendant was a landlord and owner of Shital Theatre, situated at Gomatipur, Ahmedabad. Plaintiff Shivjivan (in HRP Suit No.4732/80) averred that the compound of the theatre was given to him on lease on a monthly rent of Rs.250/-, and he is using this space for running a cycle/scooter stand for the benefit of the visitors and spectators of the theatre during the film shows. The other plaintiff Ravindrakumar (in HRP Suit No.4731/80) averred that he is a nephew of the other plaintiff Shivjivan, that he had hired one counter on the ground floor and another counter on the first floor of the said theatre on a monthly rent of Rs.150/-, and that he was a tenant of the two counters. Both the plaintiffs have averred in the suit that the landlord is trying to dispossess them by force, demanding higher rent, and the landlord is trying to oust the plaintiffs from their respective possession in order to induct new persons for running the cycle stand and the refreshment counters. The plaintiffs, therefore, filed the aforesaid two suits for a permanent injunction restraining the landlord from dispossessing them by force from the rented premises, and for consequential injunction restraining the landlord from starting new counters and/or new cycle stand.

3. The defendant landlord contested the suits by its written statement Exh.12. In substance, the defence was that the two plaintiffs are not tenants in respect of the suit premises, that there is no relationship of landlord and tenant, that the plaintiffs were mere licensees who were given a contract to run the specific business on the premises, that the plaintiffs are not in exclusive possession of the suit premises, but they held the said premises only by permissive user for the limited and specific hours of the day during which the cinema shows are run, according to the terms of the agreement between the parties.

4. By consent of parties the two suits were consolidated and issues were framed at Exhs.20 and 21 in the respective suits. After recording evidence the trial court came to the conclusion that the plaintiffs of the two suits were not tenants of the suit property within the meaning of the said Act, and that therefore, they were not entitled to the permanent injunction as prayed for. The trial court also held that inasmuch as the plaintiffs had approached the court with the plea that a relationship of landlord and tenant exists between the parties, the court had jurisdiction to hear and decide the suit under section 28 of the said Act. On a total appreciation of the evidence the trial court rejected both the suits.

5. The two plaintiffs, being aggrieved by the dismissal of their respective suits, filed Civil Appeal No.53/82 and 54/82 respectively under section 23(1) of the said Act.

6. The appellate bench of the Small Causes Court at Ahmedabad, after reappreciating the evidence on record, dismissed the two appeals. It is under such circumstances that the original plaintiffs have preferred the present revisions.

7. Before proceeding with the contentions raised in the present revision, it must be kept in mind that the present revision is one under section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. In the context of the powers of the High Court exercisable in such revisions, the ratio laid down by the Supreme court in the case of *Helper Girdharbhai* (AIR 1987 SC 1782) is most relevant. In the said decision the Supreme Court has observed in substance that in exercising revisional power under section 29(2) the High Court must ensure that the principles of law have been correctly borne in mind by the lower court. Secondly, the facts have been properly appreciated and a decision arrived at taking all material and relevant facts in mind. In order to warrant interference, the decision must be such a decision which no reasonable man could have arrived at. Lastly, such a decision does not lead to a miscarriage of justice. But, in the guise of revision, substitution of one view where two views are possible and the Court of Small Causes has taken a particular view, is not permissible. If a possible view has been taken, the High Court would be exceeding its jurisdiction if it substitutes its own view in place of that of the courts below because it considers it to be a better view. The fact that the High Court would have taken a different view is wholly irrelevant.

7.1 It must also be noted that in the case before the Supreme Court, the findings of the trial court were reversed in appeal, and it was the appellate decision which was before the High Court. The High Court in the revision under section 29(2) reversed the finding. Thus, in the revision before the High Court, it was not a case of concurrent findings of fact.

8. On the facts of the case it may be noted that the premises in question in the suit formed part of the premises of Shital Theatre situated at Gomatipur, Ahmedabad. This theatre consists of a cinema hall and the attendant superstructures, as also an open and contiguous compound. A portion of this open compound, located in a corner, was given on licence to the plaintiff Shivjivan for the purpose of running a cycle stand on a monthly licence fee of Rs.250/-.

9. Within the constructed portion of the cinema theatre, there are two corridors - one on the ground floor and one on the upper floor. There is a wooden counter located in each corridor. The other plaintiff Ravindrakumar was given these two counters on a licence basis to sell cold drinks, snacks, etc., to the visitors of the theatre, and for which he was charged a monthly licence fee.

10. The plaintiff Shivjivan has deposed as plaintiff in his own suit, and has deposed for the plaintiff Ravindrakumar in the other suit at Exh.24.

11. The material evidence on record which requires to be appreciated are the two licence agreements in question viz. Exhs. 35 and 36, both dated 7th February 1980. It is specifically mentioned in the said agreements that the two plaintiffs are mere licensees, that the period of the licence commences from 1st November 1979 and expires on 31st October 1980, that there is no relationship of landlord and tenant between the parties to the document.

12. The lower appellate court has rightly observed that the recitals in the licence agreement go a long way to determine the true relationship between the parties i.e. whether the plaintiff is a licensee or whether he is a tenant as defined under the said Act, though the document may not be completely determinative of the question by itself.

13. The lower appellate court has also appreciated the contention on behalf of the plaintiffs that the rent receipts produced at Exhs.28 to 31 mention the receipt of the amount as 'rent' and not as 'licence fee'. In this context the lower appellate court has rightly held that although this may be one of the indicators and/or pointers which may be relied upon by the plaintiffs, this use of the word 'rent' would not be determinative of the relationship between the parties.

14. As regards the appreciation of evidence on record and the facts disclosed by the evidence, it becomes clear that the plaintiffs are not in exclusive possession of the premises in question. The plaintiff Shivjivan in his deposition at Exh.24 and particularly in para 5 of his cross-examination has clearly admitted that he was appointed to look after the cycles and scooters of the visitors to the cinema. He was entitled merely to recover the fees being charged for looking after these vehicles, that he had a right to enter the premises only when the gates of the cinema theatre were opened to the public, and would be required to leave the premises once the theatre is closed. In other words, there is a specific admission of the plaintiff that his right of entry to the premises is restricted and confined to the hours of the

public shows, which are run by the theatre.

15. Another aspect of the matter is that the suit premises do not consist of a closed room or a specific location or a clearly earmarked area of the open compound. The plaintiff Shivjivan was permitted to keep the cycles and scooters in one corner of the compound, which is neither specified nor delineated. Similarly the plaintiff Ravindrakumar was permitted to sell cold drinks and snacks on loose wooden counters, one on each floor. These counters were not fixed to the floor, could be moved from one place to another without any difficulty, and in fact as per the specific admission of the plaintiff, even the ownership of these two counters is of the landlord. Furthermore, the plaintiff Shivjivan has admitted that the defendant landlord has a right to move the counters from place to place or from one place to another to suit his own convenience. Thus, in both the cases it cannot be said that there are any specified or specifiable premises in respect of which a tenancy was created. This itself goes a long way to indicate the intention of the parties, and militates against the contention that the intention was to create a lease rather than a licence for the purpose of running the specified businesses.

16. Furthermore, there is intrinsic evidence on record to show that the statutory licence to run a canteen on the premises of the theatre is in the name of the defendant theatre. Moreover, it is the theatre owner who is supplying the cold drinks, snacks and eatables to the plaintiff for selling the same to the public at the counters. The plaintiff was required to pay cash to the defendant theatre for the purchase of such cold drinks and snacks, which were ultimately sold to the public. Thus the plaintiff Ravindrakumar was in fact and effect merely a licensed vendor doing business on the premises of the defendant theatre, on the terms and conditions specified in the Licence Agreement.

17. The plaintiff Shivjivan attempted to assert that he was in possession of the entire compound of the theatre for the purpose of using the same as a cycle stand. However, he has utterly failed to prove that he is in possession of the entire compound. The lower appellate court has rightly observed that this plea or averment in itself is unnatural, illogical and moreover illegal. The Bombay Cinema Rules, 1956 clearly stipulate that every owner of cinema must provide an open compound and furthermore provide for a parking place in every theatre. Thus, the statutory obligation on the theatre owner requires not only that there should be sufficient space for parking of vehicles, but also requires that there should be sufficient open space where the public may gather, move around and/or wait while the cinema shows are going on, during

the interval between a particular show, and in the period in between the different shows. It is, therefore, next to impossible, and moreover unbelievable, that the theatre owner would assign the entire compound to his licensee for running a cycle stand.

18. Another aspect of the matter is whether there is any evidence whatsoever, or whether there is a single circumstance, which may even permit a farfetched inference to be drawn that the parties intended to create or in fact created any interest in the suit premises in favour of the respective plaintiffs. On a conspectus of the evidence on record, and a close examination of the licence agreements Exhs.35 and 36 clearly indicate that no interest has been created in favour of the plaintiffs in the suit premises. Furthermore, there is no evidence on record indicating that there was any conduct and/or act done on the part of the defendant-landlord to indicate that any interest in the suit premises was conferred on the plaintiffs.

8.1 The licence agreements at Exh.35 and 36 are clearly indicative of the intention of the parties. Exh.35 pertains to the plaintiff Shivjivan, whereas Exh.36 pertains to plaintiff Ravindrakumar.

8.2 The agreement executed by Shivjivan is specifically styled as "Cycle Stand Contract". The specific stipulations contained in this agreement are that the licensee Shivjivan will charge only the specified amount as parking fees, and that such specified fees could be changed from time to time by the theatre owner and not by the licensee. Furthermore, damage to the vehicles shall be the liability of the plaintiff and not the theatre owner, that the plaintiff will be liable for acts and omissions of his employees and also will be responsible for any misconduct of such employee, that the obligation to abide by all the rules and regulations and/or statutes as regards the employees of the plaintiffs shall rest only upon the plaintiff, etc. It may also be noted that the said licence is for a specific period viz. 1st November 1979 to 31st October 1980, and that there is no provision for extension of the said period at the option of the licensee. However, even during this specified period of licence, the option to revoke the said licence without assigning any reason whatsoever rests with the licensor. It is also significant to note that the licensee and/or his employees will be permitted to attend to the cycle stand only during the cinema shows, but not at any other time. The said agreement also reserves a right on the licensor to expel the licensee or any of the latter's employees, if in the opinion of the licensor, their conduct or behaviour with the spectators of the cinema is improper. Similarly, the other licence in favour of plaintiff

Ravindrakumar (Exh.36) contains similar provisions, the important and significant conditions being as under:

Any staff that may be required to be engaged for the purpose of running the refreshment counters would be at the cost of the licensee, including payment of necessary wages, D.A., provident fund, bonus, employees' State Insurance, etc. Even this licence was specifically granted for a period of one year commencing from 1st November 1979. It is also specified therein that even during the aforesaid period of one year the licensor would have a right to terminate the licence without assigning any reason, and in any case on the expiry of the licence period, the said licence would stand ipso facto terminated without the need of any further act or deed.

9. It is on the basis of these facts established on the record of the case that the lower appellate court has applied the principles laid down by the Supreme Court in the case of M.N. Clubwala (AIR 1965 SC 610). The said decision lays down the principles upon which a distinction is to be drawn between a lease and a licence, the circumstances under which such a distinction can be drawn, and the various relevant and material factors which are required to be considered for drawing the necessary distinction.

10. In this context I may note the various observations made in the said decision and particularly in para 12 thereof. While it is true that the essence of a licence is that it is revokable at the will of the grantor, the provision in the licence that the licensee would be entitled to a notice before being required to vacate the premises is not inconsistent with a licence. However, on the facts of the case the licences at Exhs.35 and 36 clearly indicate that the licensee may be required to vacate even without notice.

10.1 The Supreme Court, therefore, observed that the mere necessity of giving a notice to the licensee requiring him to vacate the licenced premises would not indicate that the transaction was a lease. As already observed hereinabove, the present plaintiffs were not even entitled to the notice. Furthermore, the Supreme Court has observed that section 62(c) of the Indian Easements Act, 1882 itself provides that a licence is deemed to be revoked where it has been either granted for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified Act, and the period expires or the condition is fulfilled. On the facts of the present case the licence agreement specifically contemplates that on the expiry of the tenure of the agreement, the rights of the licensee shall be extinguished ipso facto. It may also be noted that the said

licence agreement does not contain any provision for renewal of the said agreement, at the option of the licensee.

10.2 The Supreme Court observed that where the terms of the agreement are not incorporated in a formal document, the intention of the parties must be inferred from the circumstances and the conduct of the parties. However, on the facts of the case the agreement in question has been formally executed and that therefore the conduct of the parties would be merely indicative and not conclusive on this question. However, even when the surrounding circumstances are examined, one can only find that those circumstances are in favour of a finding that the relationship between the parties was that of a licensor and licensee, and not that of a landlord and tenant. One of the circumstances is whether exclusive possession of the premises was given by the landlord. As already discussed hereinabove, the possession held by the plaintiffs was not exclusive, and it was only for the limited and specified hours for the duration of the cinema shows, and each of the licensees and the respective employees could only enter when the cinema gates opened and were required to leave when the cinema shows were over.

11. The Supreme Court in the aforesaid decision, while examining the attendant facts, also observed that where the obligation to comply with the relevant statute rests with the landlord, and the liability or penalty for non-compliance thereof would have to be borne by the landlord, it could not be inferred that the intention of the parties was to create a lease. In the instant case it is the theatre owner who has to comply with the Bombay Cinema Rules, the Bombay Shops and Establishments Act, etc. Even this fact is a further indicator that the intention of the parties was not to create a lease.

12. It is on the basis of the aforesaid determining factors that the Supreme Court has further observed that the word "rent" was used loosely for "fee". Thus, merely because the receipts given by the present landlord to the plaintiffs in question used the word "rent", the same cannot lead to a conclusive inference that the intention was to create a lease.

13. In the premises aforesaid, the appreciation of evidence on the part of the lower appellate court and the conclusions drawn from such evidence are eminently justified and do not merit any interference in the present revisions. These revisions are, therefore, dismissed. Rule is discharged with no order as to costs. Interim relief vacated.

14. At this stage learned counsel for the petitioners seeks time to enable the defendants in the two suits to vacate

the premises. He vehemently submitted that at least three years' time be granted. Having applied my mind to this aspect of the matter and looking to the facts and circumstances of the case, both the concerned defendants in the suit are granted time to vacate the premises upto 31st January 1998, subject to the condition that an undertaking on usual terms is filed in this court on or before 31st January 1996. If the undertaking as aforesaid is not filed by the due date or in case of breach of any of the terms and conditions contained in the said undertaking, the decree shall become executable forthwith.